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No. 76-1377

IN THE

Supreme Court of the United States

October Term, 1976

OREGON STATE PENITENTIARY, CORRECTIONS DIVISION,
DEPARTMENT OF HUMAN RESOURCES;
PUBLIC EMPLOYE RELATIONS BOARD,

Petitioners,

v.

JERRY HAMMER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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JURISDICTION

We agree that this Court has jurisdiction over this Petition under 28 U.S.C. § 1257(3). However, it is respondent's position that the ruling challenged by petitioners' second Question Presented rests on an independent and adequate State ground, so that this Court lacks jurisdiction to review it. See pp. 8-10 *infra*.

QUESTIONS PRESENTED

1. Did the court below properly apply the constitutional standards declared by this Court in evaluating the procedures by which respondent was terminated?

2(a). Does the State Court's determination that respondent is entitled to back pay until he is properly terminated rest on an independent and adequate State ground?

(b). If not, was that determination erroneous as a matter of federal law?

STATEMENT

Respondent accepts the State's statement of the facts underlying respondent Hammer's discharge as quoted from

the opinion of the Supreme Court of Oregon (Pet. 6-7).* However, the Petition's explanation of the Public Employe Relations Board's role under Oregon law is incomplete and perhaps misleading. For, while it is true that the Board "is an independent administrative board" (Pet. 5), it does not make a *de novo* determination of the propriety of an employee's discharge. Rather, the proceeding is treated as an appeal from the employer's decision, the employee being denominated "Appellant". As the Supreme Court of Oregon has held:

> "In order to modify or reverse an agency order dismissing or suspending an employe, the Board must—in those cases where 'good faith' is not an issue—find that the action is arbitrary either because the employer has failed to establish facts to support the charges upon which the action is based or because though the charges are supported they constitute no 'cause' upon which a reasonable employer would base the action taken."[1]

This limited scope of review of the employer's decision underlies the Board's approval of respondent's discharge although it determined after hearing that less than half of the hours of unpaid sick leave on which the employer based the discharge were properly the subject of disciplinary action.[2] It is also significant in assessing the surmise that the infirmity in the pre-termination procedure could not have affected the proceedings against Hammer (Pet. 13-14).

Additionally, in order to put the jurisdictional issue in context, it is necessary that the opinions of the Supreme Court of Oregon here and in *Tupper* be described more fully than is done in the Petition. While the decisions of the Supreme Court were unanimous, one Justice concluded, without reaching the Fourteenth Amendment issue, that the

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* Petitioners will be referred to collectively herein as "the State"; "Pet." refers to the Petition for a Writ of Certiorari.

[1] *Thompson* v. *Secretary of State*, 19 Or.App. 74, 526 P.2d 621, 624.

[2] The Board determined that of the 1973 unpaid sick leave on which the charge relied, almost half was due to an industrial accident and therefore "not cognizable in any disciplinary action,"

pre-termination procedures violated Article I, § 10 of the Oregon constitution. See Pet. 32-37, followed at Pet. 20. In response, the majority explained that it determined initially that the procedures were unlawful under the Fourteenth Amendment, and only derivatively, because the due process requirements of both provisions were "essentially the same," that Art. I, § 10 was also violated:

> "The concurring opinion in this case apparently acknowledges that the due process clause of the federal constitution, as interpreted by the United States Supreme Court in *Arnett*, does not require a full-scale evidentiary hearing prior to the dismissal of a classified employee. However, that opinion then takes the position that the 'due course of law' provision in Article 1, § 10, of the Oregon Constitution should be interpreted to require a full pre-termination hearing in such cases. This issue was

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and a large portion of the 1974 unpaid sick leave had actually been authorized by the employer. Findings 1 and 2, p. 2 of PUBLIC EMPLOYE RELATIONS BOARD FOR THE STATE OF OREGON, NO. 309, RULINGS ON MOTIONS AND EVIDENTIARY MATTERS, FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER (hereafter "PERB Decision"). The Board also made the following "Finding of Ultimate Fact" with respect to Hammer's absence:

> "Appellant in 1973 and 1974, in addition to exhausting normal sick leave (12 days a year) and vacation credit (10 days and 11 days respectively) was absent on an unauthorized leave without pay basis a total of 143¾ hours in 1973, and 169 hours in 1974. Sixteen days, or 128 hours, was taken in 1973, resulting from an industrial accident, in addition to the 143¾ hours leave without pay taken. In 1974 Appellant was given permission to take 10 days on a leave without pay basis, in addition to the 160 hours taken on an unauthorized leave without pay basis." (*Id.*, p. 3.)

The 143¾ hours in 1973 and 169 hours in 1974 on which the Board based its decision contrasts with 305 hours in 1973 and 335 hours in 1974 on which the employer based its action, see Pet. 43.

The PERB concluded: "This action is found to have been taken in good faith and for cause. A reasonable employer, with posts that must be filled, would not be expected to retain an employe who consistently had this much absence from work" (PERB Decision, p. 4).

never raised, briefed or argued by the parties in this case. Moreover, as demonstrated by the cases cited in footnote four of the concurring opinion, the procedural effect of state 'due course of law' constitutional provisions is essentially the same as the procedural effect of the due process clause of the fourteenth amendment to the federal constitution. Therefore, in the absence of some compelling public interest in giving Art. 1, § 10, of our constitution a broader interpretation in this situation than that given to the due process clause of the fourteenth amendment by the federal courts, we decline to adopt such a construction. *Compare State* v. *Childs*, 252 Or 91, 99, 447 P2d 304 (1968) *with Deras* v. *Meyers*, 272 Or 47, 64 n.17, 535 P2d 541 (1975). *See also Olsen* v. *State of Oregon*, 276 Or 9, 554 P2d 139 (1976); *Plummer* v. *Donald M. Drake Co.*, 212 Or 430, 320 P2d 245 (1958)." (Pet. 30, n. 2)

With respect to remedy, the Court wrote:

"Since none of these safeguards were provided, we find that the procedures employed did not comply with the due process clause of the fourteenth amendment and that Tupper's dismissal on August 2, 1974, was invalid. Because his dismissal was invalid, we conclude that Tupper is entitled to an award of back wages and other benefits and that he should continue to receive these amounts until he has been properly terminated.[5] In determining these amounts, the Board should offset any compensation and other benefits Tupper has received since his original termination.

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[5] The Court of Appeals seems to have concluded that PERB lacked the necessary authority to order an award of back wages upon a finding that the termination was procedurally invalid. Although there is apparently nothing in the authorizing statute which gives PERB the authority to issue such an order on its own, *see* ORS 240.560, the constitutional nature of the deprivation involved is enough to require this court to direct that such an award be made. Moreover, ORS 240.563 and 183.482 specifically authorize the reviewing court to reverse or remand the agency's order if it finds '[t]he statute, rule or order to be unconstitutional.' ORS 183.482(8)(b)." (Pet. 31)

The *Hammer* decision followed *Tupper* without further comment, see Pet. 20.

REASONS FOR DENYING THE WRIT

I. THE PETITION ACCEPTS THE STATE COURT'S FORMULATION OF THE GOVERNING LEGAL STANDARDS; ITS DISAGREEMENT WITH THE COURT'S APPLICATION OF THOSE STANDARDS IS WITHOUT GENERAL IMPORTANCE AND LACKS MERIT.

As the ground for review of the holding that the procedures in dismissing respondent were constitutionally inadequate, the State broadly asserts that the Supreme Court of Oregon "has decided a federal question of substance not in accord with the reasoning of this Court." (Pet. 9, heading).[3] However, the State's actual argument in support of this proposition accepts that court's statement of the governing constitutional standard, and challenges only the application of that standard to the circumstances of this case. As so confined, the issue does not have sufficient general importance to warrant consideration by this Court; and even the State's narrow claim of error is without merit.

The State does not deny that respondent, who was subject to dismissal only "for cause" enjoyed a constitutionally protected "property" interest in his continued employment (see Pet. 4; *Tupper* opinion, Pet. 28).[4] Nor does the State dispute the Oregon Court's formulation of the basic constitutional principle: "Governmental deprivation of such a property interest must be accompanied by at least min-

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[3] While the pre-termination procedures were found to violate both the federal and state constitutions, the majority opinion below makes clear that with respect to that issue the Oregon court "felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did." *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 45 U.S.L.W. 4954, 4955 (June 28, 1977). Therefore, this Court has jurisdiction to decide that federal issue.

[4] Accordingly, the issue which divided this Court in *Bishop* v. *Wood*, 426 U.S. 341, is not presented.

imal procedural protections including some form of notice of the contemplated action and some sort of opportunity to be heard if that action is contested. [Citations omitted] The particular form of the notice and hearing required, however, will vary from case to case depending upon the particular circumstances and interests involved." *Id.*

The State also expresses no disagreement with the Oregon Court's identification of the factors which must be analyzed in determining "what process is due prior to the initial dismissal and pending subsequent review" (*id.*), nor with the discussion of *Mathews* v. *Eldridge*, 424 U.S. 319, and *Arnett* v. *Kennedy*, 416 U.S. 134 at Pet. 28-31. Indeed, the Petition relies on the identical passage from *Mathews* (424 U.S. at 335) that is quoted in the *Tupper* opinion; compare Pet. 11 with Pet. 28-29.

It is only with respect to the application of these agreed-upon legal standards to respondent's discharge that the State contends that the court below erred (Pet. 11-12). Yet while this Court undoubtedly possesses jurisdiction to review a state court's application of federal standards, the occasions for the exercise of that authority must be rare indeed. This Court having delineated the controlling factors, the task of evaluating particular state termination procedures according to those factors must perforce be left to the state courts and the lower federal courts. The State does not even assert that its claim that the Oregon Court erred in applying these criteria is especially significant or otherwise more worthy of review than a like claim which might be brought by the losing party—be it a public employer or a public employee—in any of the countless cases which will inevitably be generated by the seminal decisions in *Board of Regents* v. *Roth*, 408 U.S. 564, and *Perry* v. *Sindermann*, 408 U. S. 593.

In thus resting on its claim of error, the State ignores the admonition that this Court's exercise of its certiorari jurisdiction, "is discretionary and depends on numerous factors other than the perceived correctness of the judgment [it is] asked to review" (*Ross* v. *Moffitt*, 417 U.S. 600, 617). Moreover, the State's claim is not well taken. The assertion that the Court's opinion "does not discuss whether there was a risk of mistake through the procedures used by the penitentiary" (Pet. 12) overlooks the detailed comparison in the *Tupper* opinion between Oregon's procedures and those under the Lloyd-LaFollette Act which were deemed in *Arnett* to be sufficient to "minimize the risk of error in the initial removal decision" (Pet. 29, quoting 416 U.S. at 170, opinion of Powell, J.)).

The State argues that the risk of a mistaken termination is sufficiently minimized because the evidence on which respondent's discharge was based was documentary (Pet. 12). But it is plain from the decision of the Public Employe Relations Board that the propriety of the discharge involved much more than an interpretation of attendance records and that the risk of error was quite substantial.[5] The large discrepancy between the number of hours of unauthorized leave on which the employer acted, and the number which the PERB determined could properly be considered against him (see p. 2 and n.2, *supra*), disproves the State's contention that its procedures were more reliable than those in *Arnett*.

The State's only other objection to the invalidation of Hammer's discharge is that "the Oregon Supreme Court's opinion does not discuss the increased fiscal and administrative burdens caused by the addition of the proposed procedural safeguards" (Pet. 12). But no claim or showing of burden was made by the State before the Supreme Court of Oregon, on brief or even on Petition for Rehearing. The Supreme Court of Oregon is not to be faulted for "not discuss[ing]" a point which the State did not present.

In sum, there is no merit in the Petition's contention that the Supreme Court of Oregon erred in applying standards laid down by this Court; more significantly, the contention lacks sufficient general importance to justify this Court's attention.

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[5] Seven witnesses appeared at the hearing and the transcript runs 296 pages.

II. THE REMEDY PROVIDED BY THE STATE COURT RESTS ON AN INDEPENDENT AND ADEQUATE STATE GROUND; THE STATE'S OBJECTION TO THE REMEDY IS WITHOUT GENERAL IMPORTANCE AND LACKS MERIT.

A. The second question tendered by the Petition challenges the award of "back wages and other benefits to respondent until he is properly terminated" (Pet. 20). On this phase of the case the Petition is subject to the fundamental and decisive objection that the Oregon Supreme Court's decision on remedy rests on an independent and adequate State ground and is therefore not reviewable here. See *e.g., Zacchini* v. *Scripps-Howard Broadcasting Co.*, 45 U.S.L.W. 4954, 4955 (June 28, 1977); *Jankovich* v. *Indiana Toll Road Commission*, 379 U.S. 487, 491-492.

On this point, the Petition states: "As a result of its finding of a violation of procedural due process, the Oregon Supreme Court held that the Fourteenth Amendment dictates that Mr. Hammer is still employed and entitled to an award of back wages for the entire time involved" (Pet. 13). But the State misreads the opinion of the Oregon Supreme Court. No reference to the Fourteenth Amendment is made in that Court's discussion of the remedy question either in *Tupper* (Pet. 31) or in this case (Pet. 20). Thus, the State has failed to meet its burden of establishing the jurisdictional basis for review of the remedy ruling. And a more careful reading of the opinion below demonstrates that the Court's choice of remedy rested independently and adequately (and perhaps even exclusively) on State law.

To begin with, the State Court's choice of remedy probably does not raise a federal question at all. The Court did not say that it was relying on federal law even in part in deciding that issue; its sole reliance was on state law (Pet. 31, n. 3). And even if the finding of a violation had rested entirely on the Fourteenth Amendment, the State Court's determination of what remedy is appropriate would not necessarily raise a federal question. For while federal law assuredly establishes a *minimum* remedy which

must be provided for a violation of federal constitutional rights, it does not appear that any issue of federal law would be raised if a state court, as a matter of its own judgment, determined that its citizens should enjoy, and the State should provide, more generous relief.

But this point need not be examined further, for as we have seen, once the court below had decided that the procedures whereby respondent was discharged violated the Fourteenth Amendment, it also concluded, because "the procedural effect of state 'due course of law' constitutional provisions *is essentially the same* as the procedural effect of the due process clause of the fourteenth amendment," that Article I, § 10 of the Oregon statute is also violated (Pet. 30, n. 2, emphasis added). *Thus, the State Court's order remedied a violation of both the state and federal constitutions.* And of course, the appropriate remedy for a violation of state-created rights does not raise any federal question. Moreover, there is no indication that its selection of the remedy was similarly based on the perceived compulsions of *federal* law.[6] On the contrary, in discussing this issue, the Court corrected, *on the basis of Oregon statutes,* the Oregon Court of Appeals' view that the Public Employe Relations Board lacked authority to award back wages. See Pet. 31, n. 5, quoted at p. 3, *supra.* The Oregon statutes there referred to authorize the reviewing court to reverse or remand the agency's action if it finds the "statute, rule or order" to be "unconstitutional," without specifying that only violations of the federal constitution can be corrected; plainly, violations of the state constitution which are likewise of a higher legal order are also included. Moreover, prior Oregon decisions had provided for reinstatement with full back pay for violations of employee rights, be their source contractual, statutory, or constitutional. *Papadopoulos* v. *Oregon State Bd. of Higher Ed.*, 14 Or.App. 130, 511 P2d 854, 876, Sup.Ct.

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[6] Given the Court's scrupulous care to articulate the basis of its holding on the termination issue (thereby obviating any jurisdictional obstacles to review thereof), the inference that it was making an independent judgment on the remedy issue is compelling.

review denied, cert. denied, 417 U.S. 919, citing *Greene* v. *Howard University,* 134 U.S.App.D.C. 81, 412 F.2d 1128 (contract case).

Thus, even if the State Court's decision was based on federal grounds insofar as it remedied a violation of the Fourteenth Amendment, it rested exclusively on State grounds insofar as it remedied the violation of the State constitution. Accordingly, this Court has no jurisdiction to review that portion of the State Court's decision to which the second Question Presented by the Petition is addressed.

B. Even if, contrary to the foregoing, this Court has jurisdiction to review the propriety of the remedy, certiorari should not be granted to consider that issue. For, here also, the Petition asserts only that the decision below was wrong, as if that were a sufficient reason for granting certiorari. And here again, the State's criticism of the decision below is wide of the mark.

The Petition argues that "[e]rrors in the pretermination procedure have no effect on the merits of the grounds to terminate" (Pet. 13). The State is wrong for two reasons: First, such speculation as to "what might have been" is an impermissible ground for denying back pay to an employee for any period prior to his termination in accordance with lawful procedures; second, the argument ignores the limited review authority of the Oregon Public Employe Relations Board.

First, in *Greene* v. *United States,* 376 U.S. 149, the Court construed a Defense Department regulation to be "equitably designed to compensate employees whose security clearance has been improperly or wrongly denied." The Court construed the regulation "to mean that where a claimant establishes that the Government has improperly denied clearance by its failure to provide fair procedures, the Government is liable and petitioner is entitled to recover 'in an equitable amount for any loss of earnings during the interim resulting directly from a suspension of clearance.' " *Id.* at 161. The Court reasoned (*id.* at 162):

> "In a case such as the present, where the Government has acted without authority in causing the discharge of an employee without providing adequate procedural safeguards, we should be reluctant to conclude that a regulation, not explicitly so requiring, conditions restitution on a retrospective determination of the validity of the substantive reasons for the Government action—reasons which the employee was not afforded an adequate opportunity to meet or rebut at the time of his discharge. This principle is analogous to that reflected in state court decisions recognizing that 'a private association's failure to afford procedural safeguards may result in the imposition of damage liability without inquiry into whether the association's action lacked substantive basis. . . .' See authorities cited in Silver v. New York Stock Exchange, 373 U.S. 341, 365, note 18."

Yet it is just such "a retrospective determination of the validity of substantive reasons for" respondent's discharge that the Petition invites this Court to undertake.

Second, it is clear as a matter of law that the constitutional inadequacy of the pre-termination procedures was not "cured" by the PERB's decision after hearing. For the Board did not, as the State argues, "in effect h[o]ld that the penitentiary had made no mistake in deciding to dismiss Mr. Hammer" (Pet. 13). Rather, in accord with its limited review function under Oregon law, see p. 2, *supra,* the PERB determined only that Hammer's absences constituted cause for which a reasonable employer would discharge an employee. See pp. 2-3, n. 2, *supra.*

An argument identical to that of the State was met and rejected under parallel circumstances in *Armstrong* v. *Manzo,* 380 U.S. 545. There, a Texas trial court, without notice to the natural father, had entered an adoption decree depriving him of his parental rights. The Texas Court of Civil Appeals held "that whatever constitutional infirmity resulted from the failure to give the [father] notice had been cured by the hearing subsequently afforded to him upon his motion to set aside the decree" (see *id.* at 551). This Court disagreed because in the subsequent hearing the father was faced with a more substantial burden than would have been imposed on him if the constitutionally mandated pro-

cedures had been followed from the beginning. Mr. Justice Stewart wrote for a unanimous Court (*id.* at 552):

> "A fundamental requirement of due process is 'the opportunity to be heard.' *Grannis* v. *Ordean*, 234 U.S. 385, 394. It is an opportunity which must be granted at a meaningful time and in a meaningful manner. The trial court could have fully accorded this right to the petitioner only by granting his motion to set aside the decree and consider the case anew. Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place."

See also *Goss* v. *Lopez*, 419 U.S. 565, 581-582, n. 10.

In the present case, respondent never had the opportunity to point out to his employer, or to anyone else who possessed independent authority to determine whether he should be discharged, that a substantial part of the absenteeism with which he was charged could not properly be considered as a basis for dismissal, see p. 2, *supra*, and to urge, for instance, that since his performance at work had been entirely satisfactory, that he should be retained. Therefore, the PERB's decision *could not* wipe the slate clean. The only adequate and equitable remedy for the violation is therefore to treat the entire proceedings against respondent as a nullity, and to hold that he is entitled to receive wages and other employee benefits unless and until he is discharged in accordance with the constitutionally mandated pre-termination procedures. That is the remedy provided by the court below. If the State's challenge to that remedy is within this Court's jurisdiction, it is not of sufficient merit to warrant plenary consideration.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

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